30 C.F.R. 206.257 references the types of information that could be released under the proposed rule. 30 C.F.R. 206.257(c)(2) allows MMS to use proprietary information to value coal that is not sold pursuant to an arm's-length contract. In addition, 30 C.F.R. 206.265 allows MMS to use proprietary information to value coal which is enhanced after it has been placed in marketable condition. Proprietary information used in this manner may include "price, time of execution, duration, market or markets served, terms, quality of coal, quantity, and such other factors as may be appropriate to reflect the value of the coal." 30 C.F.R. 206.257(c)(2)(i). NMA believes that the release of such information would cause substantial competitive harm to the submitter of the proprietary information.

While the proposed rulemaking would try to minimize harm to the submitter by requiring the requestor of the information (i.e., the recipient of an assessment based on third-party proprietary information) to sign liability and confidentiality agreements prior to having access to the information, these limits are insufficient to protect these third parties. For example, 30 C.F.R. 206.257(c)(2)(i-iv) allows MMS to use proprietary information to value coal that is not sold pursuant to an arm's-length contract. To mount an effective challenge to such information, marketing and market research personnel from the requesting company would have to review the third-party proprietary information. The confidentiality agreements do not provide sufficient safeguards to assure that the proprietary information would not be used directly or indirectly by present or future competitors. The very release of proprietary information causes harm by providing competitors with knowledge of the competitive position and marketing strategy of the third-party. It would be difficult to ever prove the inappropriate use of proprietary information in such circumstances. Also, disclosure may interfere with the third-party's competitive status in other ways. For example, disclosure could interfere with the third-party's relationships with customers and transporters. Disclosure could violate the third-party's confidentiality agreements relating to contracts entered into with their customers. In turn, this could substantially jeopardize further contracts between the third-party and the customers.

The proposed rule also conflicts with the policies for the privileged and confidential treatment accorded the same or similar information under various statutes and regulations. For example, certain information submitted to MMS to support valuation proposals for ad valorem leases is exempted from disclosure, 30 C.F.R. 206.257(k); as well as fuel contract information submitted to MMS pursuant to an authorized audit. 30 C.F.R. 206.263(d). The Freedom of Information Act also exempts from disclosure information protected from public disclosure under other statutes. 5 U.S.C. 552(b)(3). The Staggers Rail Act of 1980, Pub. L. 96-448, limits disclosure of contract terms. 49 U.S.C. 10713(b). 49 C.F.R. 1313.8. In furtherance of this congressional policy, the Interstate Commerce Commission's (now the Surface Transportation Board) rules for coal contracts prohibit the disclosure of rates and charges under the contract. 49 C.F.R. 1313.13.

Although FOIA does not prohibit per se the disclosure of information that is otherwise exempt, courts have recognized the congressional policy that protects such information from unnecessary public disclosure. See Chrysler Corp v. Brown, 441 U.S.

281, 292 (1979); Critical Mass, 975 F.2d 871, 873. In Pennzoil v FPC, 534 F.2d 627, 631-2 (5th Cir. 1976), the court held that an agency must weigh the public benefit against the private harm that would result from the revelation of confidential business information. Since, there is no way to prevent harm to the submitter of the proprietary information, MMS should abandon this rule since the harm of disclosure clearly outweighs any public interest benefits. In fact, the discussion in the preamble to the proposed rule supports this contention. In the preamble, the only justification for the rulemaking is "appellants **sometimes** request information MMS used to assess additional royalties." (Emphasis added.) Yet, the possible harm in promulgating the rule is discussed several times (e.g., "release of combinations of information, such as volume and value, could cause competitive harm"; "MMS believes that commercial or financial information less than six years old concerning the volume and value of the produced substance falls into these categories [meets the tests for confidential information, the release of which could cause harm to the competitive position of the submitter]." Thus, the proposed rulemaking itself reveals that adoption of the rule could result in very real harm without any articulated benefits.

In addition, while the Supreme Court in Chrysler acknowledged that "properly promulgated substantive agency regulations have the force and effect of law," the Court added that for agency regulations permitting disclosure of confidential information to be considered "authorized by law" under the Trade Secrets Act (18 U.S.C. 1905), the regulations must be promulgated pursuant to statutory authority. 441 U.S. 281, 295. The list of statutory authorities cited by MMS do not meet the Chrysler test of allowing a "reviewing court to reasonably be able to conclude that the [statutory] grant of authority contemplates the regulations issued." 441 U.S. 281, 308. Thus, the release of proprietary information contemplated by this rulemaking is not "authorized by law" within the meaning of the Trade Secrets Act and therefore, this rulemaking should be withdrawn.

NMA submits that the agency should evaluate the availability of other public sources of similar information that can be used to meet the needs of MMS in valuation for royalty purposes. Although this information may not be as specific as that gleaned from individual contracts, it should be adequate for the purpose of evaluating similar transactions. In this regard, the rule fails to explicate why proprietary information related to third-parties is necessary for MMS to fulfill its mission with respect to royalty valuation for another party. Since every contract will be different with respect to the reasons for the bargained-for terms, we fail to see how a third-party's contract serves as an objective benchmark for royalty valuation for someone else.

MMS specifically requested comments on seven discrete issues. The following responds to those requests.

1. For the coal industry, terms and conditions of coal contracts are unquestionably proprietary. These contracts are the most likely source of information to be used as a basis for an MMS assessment in a nonarms-length sale or use and for advance royalty payments. Such contracts would retain

proprietary status until expiration; and, in the case of short term contracts, may remain proprietary for a significant time after the expiration date since competitors may be able to determine a competitor's position related to cost, volume and marketing strategy from the contract language.

2. MMS should not release proprietary information about coal contracts when there is an appeal of an MMS order or ADR even if the requestor signs confidentiality and liability agreements. As discussed above, the release of this information may provide competitors with details regarding the competitive position and marketing practices of the third-party. It would be extremely difficult to prove that such information were used in an unauthorized manner.

3. If MMS proceeds with this rulemaking, MMS should always notify the submitter of the proprietary information that such information has been requested and identify the requestor. The submitter may be aware of some competitive situation involving the requestor of which MMS may be unaware. In any event, the submitter of the proprietary information should always have the right to object to MMS' release of the information.

4. For proprietary coal sales information that is used to determine value in non-arms length transactions, the proposed safeguards are not adequate to protect the submitter's interest. Additional safeguards cannot protect the submitter from the situation described above where the proprietary information will likely be passed along to the requestor's marketing and marketing research personnel for review. Again, in such circumstances, proving the inappropriate use of the proprietary information (at the time of the request or in the future) would be extremely difficult. No safeguards exist that can expunge the proprietary information from the requestor's mind once the appeal or ADR is concluded.

5. For the reasons identified above, the proposed rule should not include release of relevant proprietary information needed to file appeals with the MMS Director or defend against civil penalties.

6. If MMS proceeds with this rulemaking, MMS should carefully restrict access to proprietary information. The more people have access to the information, the more opportunity that the information would be used improperly. If MMS discloses the information over the objection of the third-party submitter, the agency should be required to execute an indemnification agreement with the third-party that indemnifies the third-party for any damages incurred from disclosure.

7. The MMS should not charge fees for the relevant proprietary information based on the Freedom of Information Act fee schedule. Royalty payors should not have to pay for information that MMS has used for the basis of an MMS assessment if this rule is adopted.

NMA appreciates the opportunity to comment on this matter.

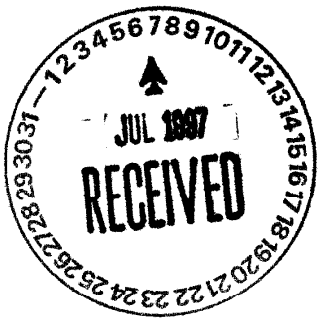
Sincerely,

Katie Sweeney

Katie Sweeney

National Mining Association

Katie Sweeney
Associate General Counsel
Legal & Regulatory Affairs



July 3, 1997

Mr. David S. Guzy
Chief, Rules and Publications Staff
Royalty Management Program
Minerals Management Service
P.O. Box 25165, MS 3101
Denver, CO 80255

Dear Mr. Guzy:

RE: Proposed Rule on Release of Third-Party Proprietary Information

This letter provides the comments of the National Mining Association (NMA) in response to the Minerals Management Service (MMS) proposal to amend its regulations to authorize MMS to provide third-party proprietary information to appellants and entities involved in administrative appeals and other Alternate Dispute Resolution (ADR) when the information is the basis for an MMS assessment of additional royalties. 62 Fed. Reg. 16116 (April 4, 1997). The National Mining Association is a trade association whose members include producers of most of America's coal, metals, industrial and agricultural minerals; manufacturers of mining and mineral processing machinery and supplies; transporters; financial and engineering firms; and other businesses related to mining.

NMA opposes the release of third-party proprietary information as proposed by MMS. As MMS correctly identifies, the type of information discussed in the rulemaking meets the criteria for protection from disclosure under Exemption 4 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(4). The detailed information submitted would meet the generally applicable test for this exemption since disclosure would, indeed, likely "cause substantial harm to the competitive position of the person from whom the information was obtained." National Parks and Conservation Assn. v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). Moreover, the information related to volumes, values and contract specifications is generally considered confidential and privileged as a matter of commercial practice, and is not customarily made available to the public or voluntarily disclosed to the government. See e.g., Critical Mass Energy Project v. NRC, 975 F.2d 871, 873 (D.C. Cir. 1992); see also, *"A Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records,"* H. Rep. No. 199, 100th Cong. 1st Sess. 12 (1987) (Detailed information in a company's marketing plans, profits and costs qualify as confidential business information.)

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